Supreme Court of the United States

October Term, 1956

No. ~~707~~ 69

SAFEWAY STORES, INCORPORATED,
a corporation,

Petitioner,

vs.

HARRY V. VANCE, Trustee in
Bankruptcy for
FRANK MELVIN THOMPSON, BANKRUPT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE TENTH CIRCUIT

DOUGLAS STRIPP,
Counsel for Petitioner,
15th Floor Dierks Bldg.
Kansas City, Missouri.

W. A. KELEHER,
JOHN B. TITTMANN,
Albuquerque, New Mexico,
WATSON, ESS, MARSHALL & ENGGAS,
Kansas City, Missouri,
Of Counsel.

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, SAFEWAY STORES, INCORPORATED, a corporation, by its attorneys, respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in this cause on November 6, 1956.

OPINIONS BELOW

The opinion of the United States District Court for the District of New Mexico is reported in 137 F. Supp. 841, and appears in the certified copy of the record printed

for use in the Court of Appeals, at Pages 8 to 27.* The opinion of the Court of Appeals has not yet been reported, but appears in the record on Certiorari at Pages 3 to 10 and a printed copy thereof is appended to this Petition. No opinion was rendered by the Court of Appeals in denying the Petition for Rehearing.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit, sought to be reviewed, was dated November 6, 1956, and entered on the same date (R-11).

The Petition for Rehearing was filed on November 26, 1956, (R-12) and denied by Order entered December 4 (R-17). On December 12, 1956, an Order was issued staying issuance of the mandate for thirty days from December 14, 1956, pending Petition for Certiorari (R-17).

The jurisdiction of this Court is invoked under 28 USC Section 1254 (1).

QUESTION PRESENTED FOR REVIEW

Does Section 3 of the Robinson-Patman Act amend the Clayton Act so as to be one of the "antitrust laws" defined in Section 1 of the Clayton Act, for violation of which Section 4 of the Clayton Act creates a civil treble damage remedy?

*Certified record on certiorari is hereinafter referred to and identified as "R".

Certified copy of the record printed for use in the Court of Appeals is hereinafter referred to and identified as "PR".

STATUTORY PROVISIONS INVOLVED.

The following statutory provisions are involved, and the pertinent parts thereof are quoted herein as follows:

Robinson-Patman Act, Section 3,
49 Stat. 1528, Title 15, USC 13a:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

"Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both."

Clayton Act, Section 4,
38 Stat. 731, Title 15 USC 15:

"Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-

fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Clayton Act, October 15, 1914, Chapter 322, Section 1, 38 Stat. 730 (1st paragraph)

"That 'antitrust laws' is used herein includes the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes', of August twenty-seventh, eighteen hundred and ninety-four; an Act, entitled 'An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes' approved February twelfth, nineteen hundred and thirteen; and also this act."

Title 15 USC 12 (1st paragraph)

"'Antitrust laws,' as used in sections 12, 13, 14-21, and 22-27 of this title, includes sections 1-27 of this title."

STATEMENT OF THE CASE

The judgment of the Court of Appeals sought to be reviewed reversed the judgment of the District Court dismissing the First Amended Complaint (R-11).

The First Amended Complaint charges petitioner with violation of the second and third clauses of Section 3 of the Robinson-Patman Act, 15 USC 13a, by selling goods in one part of the United States at prices lower than those exacted elsewhere in the United States, and by selling goods at unreasonably low prices, all for the purpose

of destroying competition or eliminating competitors. (PR 2-6).

Petitioner filed its Motion to Dismiss on the ground, among others, that Section 3 of the Robinson-Patman Act, 15 USC 13a, is not one of the "antitrust laws" within the purview of Section 4 of the Clayton Act, 15 USC 15, and consequently no private right of action for violation thereof exists under the laws of the United States (PR 6-7). The District Court sustained the Motion to Dismiss on the ground above stated, reserving its ruling on other grounds included in the Motion, and entered its Order dismissing the case on January 18, 1956 (R-8). Said order granted plaintiff thirty days in which to amend, and plaintiff thereafter filed its election not to amend (R-27). The District Court thereupon entered a supplemental order dismissing the First Amended Complaint, and the case (PR 27-28). An appeal was taken from this judgment (PR-28).

The Court of Appeals reversed the order of the District Court, and remanded the case for further proceedings (R-11). The Court of Appeals held that Section 3 of the Robinson-Patman Act, 15 USC 13a was an amendment of the Clayton Act and therefore an "antitrust law" within the meaning of Section 4 of the Clayton Act, 15 USC 15, for violation of which a private litigant had a civil remedy for treble damages for any injury to his property caused by such violation, pursuant to 15 USC 15.

Federal jurisdiction in the court of first instance was based on Title 28 USC 1337.

REASONS FOR ALLOWANCE OF THE WRIT

1. The decision herein is in direct conflict with the decision of the Court of Appeals for the Seventh Circuit

in the case of *Nashville Milk Company* vs. *Carnation Company*, decided November 1, 1956, not yet reported, a copy of the opinion being attached to this Petition as Appendix B.

Both this case and the Carnation case were based upon alleged violations of Section 3 of the Robinson-Patman Act. That section is a criminal statute providing a penalty of $5,000 fine or imprisonment for one year or both.

The Court below, in reversing the decision of the District Court, squarely held that Section 3 of the Robinson-Patman Act was a part of and amendatory to the Clayton Act, and therefore was one of the "antitrust laws" defined in Section 1 of the Clayton Act. Consequently it concluded that Section 4 of the Clayton Act created a private civil remedy for treble damages for violation of Section 3 of the Robinson-Patman Act. The Court below rejected the contention that both the text of the Robinson-Patman Act and its legislative history plainly demonstrated that Section 3 thereof was not an amendment to the Clayton Act and was not so intended. The Court relied upon and adopted the reasoning and conclusions in the case of *Balian Ice Cream Co.* vs *Arden Farms Co.* et al, 94 F. Supp. 796 (DC Calif. 1950). The Court further relied upon the dicta in *Bruce's Juices, Inc.*, vs. *American Can Co.* 330 U. S. 743, 91 L. ed. 1219, 1228, (1946) and the result in *Moore* vs. *Mead's Fine Bread*, 348 U.S. 115, 99 L. ed. 145 (1954). The decision was based primarily upon the assumption that since Section 3 of the Robinson-Patman Act deals with a problem within the general field of antitrust legislation it must be an amendment to and a part of the Clayton Act, so as to be one of the antitrust laws therein defined.

The decision of the Court of Appeals for the Seventh Circuit in the *Nashville Milk* vs. *Carnation Company* case, supra, is diametrically opposed. The Court there sustained

dismissal of the Complaint by the District Court on the sole ground that Section 3 of the Robinson-Patman Act was not an amendment of or part of the Clayton Act, and therefore was not one of the antitrust laws defined in the Clayton Act, for violation ~~of which~~ the civil remedy of treble damage recovery is created.

The Seventh Circuit rejected the reasoning and conclusions reached in the *Balian* case, supra, and followed and relied heavily upon the decision of the District Court in the case at bar. The decision was based upon an analysis of the text of the Robinson-Patman Act and its legislative history, from which the Court concluded that Congress clearly did not intend Section 3 of the Robinson-Patman Act to be a part of or an amendment to the Clayton Act and therefore it was not one of the antitrust laws as defined in that Act. The Court also relied upon the unanimous opinion of legal scholars who have considered the question, as well as the findings of the Attorney General's National Committee to Study the Antitrust Laws. The Court did not consider the dicta in *Bruce's Juices* (supra), nor the result in *Moore* vs *Mead's Fine Bread* (supra), dispositive or persuasive, since the issue was neither raised nor adjudicated in either case.

The conflict is irreconcilable. Section 3 of the Robinson-Patman Act either is or is not an "antitrust law" within the meaning of Section 4 of the Clayton Act. The conflict likewise exists in District Court decisions, as shown by the citations contained in both opinions below, as well as in the opinion in the *Nashville Milk* vs. *Carnation Company* case, supra. The question is of such far-reaching importance in the field of civil antitrust litigation that the conflict should be promptly resolved by this Court.

2. The question presented involves the proper con-

struction of an Act of Congress having far-reaching importance in the field of commerce and antitrust litigation, which has not been but which should be determined and settled by this Court.

The question presented has not been decided by this Court, although the statute in question was passed in 1936. The remark relative thereto in the *Bruce's Juices* case, supra, was unnecessary to a decision in that case. Nor is that remark necessarily inconsistent with the contention here urged, since a single act of discrimination could be subject to both the civil penalty of treble damages under Section 2 of the Clayton act as amended by Section 1 of the Robinson-Patman Act, and to the criminal penalties under Section 3 of the Robinson-Patman Act.

The case of *Moore* vs. *Mead's Fine Bread Co.*, supra, is not dispositive of the issue here presented. In that case the question was neither raised, briefed nor argued in any court. The decision in that case should not be construed as controlling legal authority on a question not at bar and not adjudicated.

The thinking of legal writers and scholars is unanimous in support of petitioner's contention, and the extent thereof is indicative of the importance of the question presented.

Harvard Law Review, Volume 50, 106, 121, 122;

Wernc, "Business and the Robinson-Patman Law" (1938);

85 University of Pennsylvania Law Review, 306, 312;

22 Washington University Law Quarterly, 153, 182;

22 American Bar Association Journal, 539, P. 649, n.14;

The importance of the question and the necessity for

decision are further emphasized by the comment of the Attorney General's National Committee to Study the Antitrust Laws, which said, at Page 200 of its Report of March 3, 1955:

> "We believe that acceptance of Section 3 as a basis for private treble damage litigation involves highly dubious statutory construction and, more important, finds support neither in the legislative intent nor overall antitrust policy. Hence, at the least, any authority to enforce Section 3 should be restricted to responsible officials of the United States. Such drastic legislation threatening common and competitive pricing practices with the risk of criminality, if tolerated at all, should be accessible only to the Government which has already sought to limit its application.

Numerous treble damage actions alleging violations of Section 3 of the Robinson-Patman Act have been brought, and are now pending in the District Courts. That such actions will be filed in the future in increasing numbers can be anticipated, especially when one considers the temptation to sue a competitor and the ease of charging sales at "unreasonably low prices for the purpose of destroying competition or eliminating a competitor". The course of all such litigation will be controlled by a decision of the question here presented. The issue presented is appropriate for review by this Court because it is fundamental to the further conduct of this case. *Land* vs. *Dollar*, 330 U.S. 731, 734, n.2, 91 L. ed. 1209, 1214 (1947); *U.S.* vs. *General Motors*, 323 U. S. 373, 377, 89 L. ed. 311, 318; (1945) *Larson* vs. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685, n. 3, 93 L. ed. 1628, 1633 (1948)

3. The decision of the Court below is believed to be erroneous, and the conflicting decision of the Seventh Circuit is correct and should be sustained.

The Court below does not dispute the general rule that where a statute creates a new offense and denounces the penalty, the penalty can be only that which the statute prescribes.

Wilder Manufacturing Co. vs. *Corn Products Refinery Co.*, 236 U.S. 165, 59 L. ed. 520; (1914)

United States vs. *Cooper Corp.*, 312 U. S. 592, 85 L. ed. 1071, 1076 (1940)

Paine Lumber Co. vs. *Neal*, 244 U.S. 459, 61 L. ed. 1256 (1916)

Bruce's Juices, Inc. vs. *American Can Co.*, supra.

The Court below likewise agrees that the United States Code is only prima facie evidence of the law, and the statute must control in the event of discrepancy. It further agrees that if Section 3 of the Robinson-Patman Act is not an amendment to the Clayton Act so as to be a part thereof, no treble damage remedy exists.

Its decision is based solely upon its assumption that Section 3 of the Robinson-Patman Act relates generally to the antitrust field and, for such reason is necessarily a part of the Clayton Act, which we submit is erroneous. The assumption could be applied with equal justification to Section 5 of the Federal Trade Commission Act, (15 USC Section 45, 38 Stat. 719). This Court has held that no private right of action exists under said statute. *Moore* vs. *New York Cotton Exchange*, 270 U.S. 593, 603 70 L. ed. 751 (1926). The assumption further disregards the text, punctuation and structure of the Robinson-Patman Act as well as its legislative history, both of which are analyzed in the opinion of the District Court in this case and in the opinion in the *Nashville Milk* vs. *Carnation Company* case, supra. Both demonstrate that Congress did not intend Section 3 of the Robinson-Patman Act to be a part of or

an amendment to the Clayton Act. This assumption is in conflict with the unanimous opinion of legal writers.

CONCLUSION

It is respectfully submitted that the petition should be granted, and the Writ issue.

Douglas Steere,
Counsel for Petitioner,
15th Floor Dierks Bldg.
Kansas City, Missouri

W. A. Keleher,
John B. Tittmann,
Albuquerque, New Mexico,

Watson, Ess, Marshall & Enggas,
Kansas City, Missouri,
Of Counsel.

APPENDIX A

United States Court of Appeals

Tenth Circuit

No. 5366 SEPTEMBER TERM, 1956.

HARRY V. VANCE, Trustee in Bankruptcy for FRANK MELVIN THOMPSON, Bankrupt, *Appellant*,

vs.

SAFEWAY STORES, INCORPORATED, a corporation, *Appellee*.

Appeal from the United States District Court for the District of New Mexico.

Robert J. Nordhaus, Albuquerque, New Mexico, (Nordhaus & Moses), for Appellant;

John B. Tittmann, Albuquerque, New Mexico, (W. A. Keleher, Albuquerque, New Mexico; Douglas Stripp, and Watson, Ess, Marshall & Enggas, all of Kansas City, Missouri, were with him on the brief), for Appellee.

Before HUXMAN, MURRAH and PICKETT, *Circuit Judges*.

PICKETT, *Circuit Judge*.

The Trustee in Bankruptcy for Frank Melvin Thompson brought this action against Safeway Stores, Inc., to recover treble damages under §3 of the Robinson-Patman

Act, (15 U.S.C.A. §13a[1]). The complaint is based solely upon violations of the second and third clauses of §3, wherein it is alleged that Safeway made sales at unreasonably low prices and territorial discrimination in prices for the purpose of injuring competition to the damage of Thompson, who at the time was in the retail grocery business in Albuquerque, New Mexico. It suffices to say that the allegations, if true, constituted violations of §3. The trial court expressed doubt as to the constitutionality of §3, but chose to base its conclusion on a holding that the section was no part of the antitrust statutes of the United States, and dismissed the action on the ground that a civil action for treble damages was not available to a private litigant under 15 U.S.C.A. §15. We do not agree with this conclusion.

15 U.S.C.A. §15 was included in the Clayton Act, (38 Stat. 730), and provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold the damages by him sustained, * * *" together with reasonable attorney's fees and costs. The Clayton Act defined "antitrust laws" as designated statutes existing at the time. Upon codification this section became 15 U.S.C.A. §12, and defined "antitrust laws" as sections 1-27 of Title 15. It is contended that §13a was not

[1] §13a reads as follows:

"Discrimination in rebates, discounts, or advertising service charges; underselling in particular localities; penalties.

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

"Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both. June 19, 1936, c. 592, §3, 49 Stat. 1528."

one of those antitrust laws as defined in §1 of the Clayton Act and the codifiers could not amend the law by including it in §12. This is no doubt true if §3 is a separate act. The code is only prima facie evidence of the law, and the language of the original statute controls. Act creating U.S. Code, U.S.C.A. Vol. 1, p. 4; Stephan v. United States, 319 U.S. 423; Murrell v. Western Union Tel. Co., 5 Cir. 160 F.2d 787. If, however, §3 is in fact an amendment to the Clayton Act, it was properly designated in the codification. To be an amendment to an existing law, the statute need not be so labeled. A law is amended when it is permitted to remain and something is added or taken from it or is in some way changed or altered to better accomplish its purpose. United States v. Lapp, 6 Cir., 244 Fed. 277; Balian Ice Cream Co. v. Arden Farms Co., 94 F.Supp. 796.

In holding that §3 was not an amendment to the Clayton Act but a separate Act for which a civil remedy was not available to the plaintiff under §15, the trial court relied to a large extent upon the legislative history of the Act. Safeway here insists that the history sustains the trial court, while the Trustee maintains the opposite view. We think a study of the committee reports, the discussions and debates on the Robinson-Patman Act, both in the House and Senate, leads to the conclusion that it was generally understood at the time that §3 of that Act was supplementary and amendatory of the antitrust laws and that in addition to the criminal sanctions, an injured party could recover treble damages under the provisions of the Clayton Act. The Act dealt exclusively with the subject matter of the existing antitrust laws. It was a continuation of the Congressional attack upon the evils of combinations, monopolies and restraints of trade and commerce designed to stifle competition. In each instance "Congress was dealing with competition which it sought to protect, and monopolies which it sought to prevent." Standard Oil Co. v. United States, 340 U.S. 231, 249; Staley Mfg. Co. v. Federal Trade Commission, 7 Cir., 135 F.2d 453. The title to the Act states that it is an act to amend §2 of the Clayton Act, and for other purposes, but the enacting

clause recites only that §2 "is amended to read as follows:" and the entire Robinson-Patman Act follows, although the first section, designated as §2, is in quotation marks, while the last three sections are not. We do not think that failure to include the last three sections in quotation marks has the significance which the trial court gave to it, because these sections are not referred to in any other manner than in the enacting clause. Without specific language excluding these three sections from the enacting clause, we feel constrained to hold that they are included thereunder and must be considered as amending the Clayton Act.

In Balian Ice Cream Co. v. Arden Farms Co., supra, Judge Yankwich, in a thorough and painstaking review of antitrust legislation and the authorities, concluded that §3 was an amendment of the Clayton Act and upheld the right of a private litigant to sue for treble damages under §15. We adopt the reasoning and conclusions reached in that case. Generally the courts which have had occasion to consider the question have agreed that the recovery of treble damages was available to private litigants for violation of §13a. Atlanta Brick Co. v. O'Neal, (D.C.E.D. Tex.) 44 F.Supp. 39; A.J. Goodman & Son v. United Lacquer Mfg. Corp., (D.C. Mass.) 81 F.Supp. 890; Spencer v. Sun Oil Co. (D.C.Conn.) 94 F.Supp. 408; Myers v. Shell Oil Co. (D.C.S.D.Calif., Cen. Div.) 96 F.Supp. 670; Hershel Calif. Fruit Prod. Co. v. Hunt Foods, (D.C.N.D.Calif. S.D.) 119 F.Supp. 603, appeal dismissed 9 Cir., 221 F.2d 797. National Used Car Market, Inc., v. Nat'l Auto Dealers Assn. (D.C., D.C.) 108 F.Supp. 692, the District Court was inclined to the view that §3 did not provide a civil remedy for damages, but did not so hold. The action was dismissed on other grounds and affirmed, 200 F.2d 359.

Although it was not necessary to a decision in the case, the Supreme Court in Bruce's Juices, Inc., v. American Can Co., 330 U.S. 743, 750, had this to say:

> "The Act prescribes sanctions, and it does not make uncollectibility of the purchase price one of them. Violation of the Act is made criminal and upon conviction

a violator may be fined or imprisoned. 49 Stat. 1528, 15 U.S.C. §13a. Any person who is injured in his business or property by reason of anything forbidden therein may sue and recover threefold the damages by him sustained and the costs of suit, including a reasonable attorney's fee. 38 Stat. 731, 15 U.S.C. §15. This triple damage provision to redress private injury and the criminal proceedings to vindicate the public interest are the only sanctions provided by Congress."

Considering the result in Moore v. Mead's Fine Bread Co., 10 Cir., 184 F.2d 338, vacated and remanded 340 U.S. 945; and 208 F.2d 777, reversed 348 U.S. 115,[1] and what was said in the Bruce's Juices case, without further word from the Supreme Court, we would be extremely hesitant to hold that a valid judgment for treble damages could not be had for violations of §13a.

Reversed.

[1] In the Mead Bread case, as in this case, the plaintiff sought treble damages for violations of §13a. We first sustained a dismissal of the complaint. Upon mandate from the Supreme Court, this judgment was vacated and the case was tried to a jury which returned a verdict in favor of Moore for treble damages. We reversed and remanded with instructions to enter judgment for the defendant. The Supreme Court reversed and affirmed the judgment of the District Court. Although the question here was not raised, the court held that violations of §13a were "included within the scope of the antitrust laws" with the right to treble damages, even though the victim is a local resident and no interstate transactions were used to destroy it.

In the
United States Court of Appeals
For the Seventh Circuit

No. 11820 SEPTEMBER TERM AND SESSION, 1956.

NASHVILLE MILK COMPANY,
Plaintiff-Appellant,
v.
CARNATION COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Western Division.

November 1, 1956.

Before DUFFY, *Chief Judge*, and MAJOR and SCHNACKENBERG, *Circuit Judges*.

DUFFY, *Chief Judge*. This is an appeal from an order dismissing the complaint herein before trial. This action was brought under §3 of the Robinson-Patman Act (§ 13a, Title 15 U.S. Code). Plaintiff sought to recover treble damages and asked injunctive relief claiming defendant had sold filled milk at unreasonably low prices for the purpose of destroying competition by plaintiff in its sale of a like product.

Plaintiff is an Illinois corporation, and since April, 1951, has manufactured and sold filled milk within the State of Illinois where such manufacture and sale is legal under the laws of Illinois. Defendant is a Delaware corporation which owns and operates some 30 factories in 20 states for the processing of milk.

Since May, 1952, defendant has manufactured filled milk

at its factory located at Morrison, Illinois. For the purpose of manufacturing filled milk defendant has transported or caused to be transported into Illinois whole milk from the State of Wisconsin, and vegetable oils from various points outside of Illinois. The filled milk manufactured by Carnation has been marketed under the name "Topic" while plaintiff's filled milk product was marketed under the name "Rich Whip".

Defendant moved to dismiss the complaint on four grounds. 1) The Robinson-Patman Act does not protect a business engaged in making and selling a product banned by Congress from the channels of interstate commerce; 2) The complaint fails to allege that any sales of filled milk by either plaintiff or defendant were in the course of interstate commerce; 3) The complaint fails to allege that the manufacture of filled milk by the defendant was in the course of interstate commerce, and 4) A private action may not be maintained for an alleged violation of § 3 of the Robinson-Patman Act.

The District Court dismissed the complaint for the reason that no relief should be accorded to the plaintiff in view of the declared congressional policy relative to filled milk as announced in 21 U.S.C.A. § 62 which proscribes the shipment or delivery for shipment of filled milk in interstate commerce.

The decision of the District Court must be affirmed if the order of dismissal can be sustained on any of the grounds urged by defendant in support of its motion to dismiss. *Gallagher & Speck, Inc.* v. *Ford Motor Company*, 7 Cir., 226 F. 2d 728, 731. Inasmuch as we are convinced that a private action may not be maintained for a violation of § 3 of the Robinson-Patman Act, we shall not discuss the other grounds urged by the defendant.

The Supreme Court has not ruled upon this question[1]

[1]Section 3 has been referred to in Supreme Court dicta as though it were a statute under which a private suit for treble damages could be maintained. Bruce's Juices, Inc. v. American Can Co., 330 U. S. 743, 750, and Moore v. Mead's Fine Bread Co., 348 U. S. 115, 117. However, in neither of these cases was the private right to sue under Section 3 in issue.

and as far as we are advised, there has been no direct decision on the point by any Court of Appeals. There is, however, a direct conflict of authority in the District Courts. The leading case which holds that such a cause of action does exist is *Balien Ice Cream Co. Inc.* v. *Arden Farms Co., et al.*, 94 F. Supp. 796 (DC Calif. 1950). The leading case to the contrary is *Vance* v. *Safeway Stores*, 137 F. Supp. 841 (DC N. Mex., 1956). In the *Vance* case Judge Rogers carefully considered the decision in the *Balien Ice Cream* case and reached the conclusion that it was wrongly decided.

Plaintiff has no right to sue for treble damages or injunctive relief unless a federal statute has created that right. *Sun Theatre Corp.* v. *RKO Radio Pictures, Inc.*, 7 Cir., 213 F. 2d 284, 286; *Paine Lumber Company, Ltd. et al.* v. *Neal etc. et al.*, 244 U.S. 459, 471. The only statutes upon which the plaintiff could possibly rely are sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15, 26); Section 4 provides that any person injured in his business or property by reason of anything forbidden by the "antitrust laws" may recover treble damages. Section 16 authorizes private suits for injunctive relief against threatened damage by a violation of the "antitrust laws."

The Clayton Act (38 Stats. 730) defines the term "antitrust laws" and states precisely what that term means as it is used throughout the Act. Section 1 of the Clayton Act defines "antitrust laws" to mean the Sherman Act (Act of July 2, 1890), the Wilson Tariff Act (Act of August 27, 1894), the Act amending the Wilson Tariff Act (Act of February 12, 1913) and the Clayton Act itself.

It is quite apparent that confusion has arisen as to whether section 3 of the Robinson-Patman Act is an "antitrust law" within section 1 of the Clayton Act because of an error in codification in the 1940 U.S. Code. In the 1926 U.S. Code, section 1 of the Clayton Act was codified (15 U.S.C. § 12) to read: "'Antitrust laws' as used in sections 12-27 of this title (Title 15) includes sections 1-27 of this title." This was correct because sections 1-27

of Title 15 were the Sherman Act, the Wilson Tariff Act (as amended) and the Clayton Act. The 1934 Code was the same.

However, in the 1940 Code which followed the passage of the Robinson-Patman Act in 1936, the codifiers only partially recognized that sections 2, 3 and 4 of the Robinson-Patman Act (codified as 15 U.S.C. § 21a, § 13a and § 13b) were no part of the Clayton Act or any amendments to any of its sections by changing the figures "12-27" in 15 U.S.C. 12 (the codification of section 1 of the Clayton Act) to 12, 13, 14-21, 22-27," so that the statute read: "'Antitrust laws' as used in Secs. 12, 13, 14-21 and 22-27 of this title includes secs. 1-27 of this title." But the codifiers failed to make a corresponding change in the figures 1-27 with the result upon casual inspection the term "antitrust laws" might seem to include secs. 2, 3 and 4 of the Robinson-Patman Act. The 1946 and 1952 Codes continued the error.

However, the United States Code is only prima facie evidence of the laws of the United States. In case of inconsistencies between the code and the corresponding legislation theretofore enacted, effect is to be given to the enactments themselves. 1 U.S.C. p. 4; *Stephan* v. *United States*, 319 U.S. 423, 426.

Because section 1 of the Robinson-Patman Act is without question an amendment of the Clayton Act, it has been argued that section 3 is also such an amendment. A close examination of the text of the Robinson-Patman Act and of its legislative history convinces us that section 3 is not an amendment of the Clayton Act.

The first section of the Robinson-Patman Act begins with this statement: "Be it enacted * * * that Sec. 2 of (the Clayton Act) is amended to read as follows:". No such statement appears at the beginning of sections 2, 3 or 4 of the Robinson-Patman Act. These sections do not purport to amend as section 1 specifically did.

Immediately following the enacting clause, section 1 con-

tinues with the text of subsections (a) through (f) each subject being enclosed in quotation marks so as to show how the amended section 2 of the Clayton Act is to read. There are no quotation marks enclosing any of the remaining sections. This ommission of quotation marks is significant to one who is accustomed with the procedures used in drafting bills and amendments thereto in the Congress of the United States. Illustrations of the practice of enclosing in quotation marks that portion of the bill which amended other laws can be seen in such legislation as Chapter 634, 49 Stat. 1555 relating to the Migratory Bird Act; Chapter 811, 49 Stat. 1925, relating to Naturalization Laws and Chapter 816, 49 Stat. 1930, relating to Welfare of American Seamen, in each of which quotation marks enclose the portions of those bills which amended existing law while quotation marks were omitted for those portions of the bills which were not amendments.

The legislative history is convincing that there was no intention by Congress for section 3 of the Robinson-Patman Act to be an amendment of the Clayton Act. Senator Robinson and Representative Patman had introduced their bills in the Senate and House, respectively. About eight months later a bill known as the Borah-Van Nuys Bill was introduced into the Senate. This provided for a criminal statute. Later, the Borah-Van Nuys Bill was attached to the Robinson Bill in the senate by a floor amendment. The phraseology of the Borah-Van Nuys measure remained unchanged until its enactment as section 3 of the Robinson-Patman Act.

After the passage of the Patman bill in the House and the Robinson bill in the Senate, these bills went to a conference. The Conference Committee reported a revised draft on June 15, 1936 which incorporated the Borah-Van Nuys measure as section 3 (80 Cong. Rec. 9414). The report of the Conference Committee (80 Cong. Rec. 9414, 9902) expressly stated that only section 1 was an amendment of the Clayton Act. The report stated:

"Section 2.

"The provisions of Section 2 of the House bill were agreed to without amendment by the Senate. Relating only to pending rights of action and proceedings, and being therefore temporary in purpose, it appears in the conference report as section 2 of the bill itself, rather than as part of *the amendment to section 2 of the Clayton Act, which is provided for in section 1 of the present Bill.*" (Emphasis supplied)

"Section 3.

"Subsection (h) of the Senate amendment, which was not contained in the House bill, was accepted by the House conferees, and * * * appears in the conference report as section 3 of the bill itself. It contains the operative and penal provisions of what was originally the Borah-Van Nuys Bill (S. 4171). *While they overlap in some respects*, they are in no way inconsistent with the *provisions of the Clayton Act amendment provided for in section 1.*" (Emphasis supplied)

Representative Utterback, Chairman of the House Members of the Joint Conference Committee, stated in his report to the House (80 Cong. Rec. 9419): "Section 3 of the bill sets aside certain practices therein described, and attaches to their commission the criminal penalties of fine and imprisonment therein provided. It does not affect the scope or operation of the prohibitions or limitations laid down by *the Clayton Act amendment provided for in section 1.*" (Emphasis supplied).

Representative Miller, one of the House conferees of the Joint Conference Committee, stated (80 Cong. Rec. 9421): "Section 3 is the Borah-Van Nuys amendment. We accepted that amendment for this reason and this reason only. The first section of the bill as reported back here *amends section 2 of the Clayton Act.*" Mr. Miller, when asked whether section 3 was "a part of the same act" as

the part of the bill amending the Clayton Act replied (80 Cong. Rec. 9421): "Of course it is, *but it is not a part of the Clayton Act* * * *." (Emphasis supplied).

Writers of law articles on the subject here for decision have taken the position that no action may be maintained for treble damages under section 3 of the Robinson-Patman Act. 50 *Harvard Law Review*, 106, 121-122; 85 *University of Pennsylvania Law Review*, 306, 312; 22 *Washington Law Quarterly*, 153, 159, 182; 22 *American Bar Association Journal*, 593, 649.

The Attorney General's National Committee to Study the Antitrust Laws said, on page 201 of its report of March 31, 1955:

> "We believe that acceptance of section 3 as a basis for private treble damage litigation involves highly dubious statutory construction and, more important, finds support neither in the legislative intent nor overall antitrust policy. Hence, at the least, any authority to enforce Section 3 should be restricted to responsible officials of the United States. Such drastic legislation threatening common and competitive pricing practices with the risk of criminality, if tolerated at all, should be accessible only to the government which has already sought to limit its application."

As we have reached the conclusion that a private action may not be maintained for a violation of Section 3 of the Robinson Patman Act, it follows that the District Court was correct in dismissing the complaint and the order and judgment of dismissal must be and is

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.